

**COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY**

Investigation by the Department of Telecommunications
and Energy on its own Motion, pursuant to M.G.L.
c. 159, §§ 12 and 16, into the regulations,
practices, equipment, appliances, and services of
Network Plus, Inc.

D.T.E. 02-15

March 13, 2002

HEARING OFFICER RULING ON LATE FILED PETITION TO INTERVENE OF
ASSOCIATION OF COMMUNICATIONS ENTERPRISES

I. INTRODUCTION

On March 7, 2002, the Association of Communications Enterprises (“ASCENT”) filed with the Department of Telecommunications and Energy (“Department”) a petition to intervene in D.T.E. 02-15, the Department’s investigation into the potential discontinuance of telecommunications service to the customers of Network Plus, Inc. (“Network Plus”) in Massachusetts as a result of the company’s ongoing bankruptcy proceeding. Pursuant to the Vote and Order to Open Investigation¹ and the published Legal Notice, the period for timely intervention in this proceeding expired February 25, 2002. During the hearing held on February 25, 2002, the hearing officer granted the timely filed petitions to intervene of XO Communications, PaeTec Communications, RNK Inc., Conversent Communications, AT&T Communications of New England, Inc., and Global NAPs, Inc. No party filed a response to ASCENT’s late-filed petition to intervene.

II. POSITIONS OF THE PETITIONER

In its petition to intervene, ASCENT states that it is a national industry organization, of which Network Plus is a member (Petition at 1). ASCENT further states that several of its members are authorized to provide interexchange services in the state of New Hampshire [sic] (id.). ASCENT seeks to intervene in this proceeding in order to represent its members’ interests in the proceeding (id. at 2). ASCENT indicates that its sole purpose in seeking intervention is to monitor the proceeding and that ASCENT’s intervention will not unduly broaden the issues or prejudice other parties (id.).

¹ Network Plus, Inc., D.T.E. 02-15, Vote and Order to Open Investigation (February 20, 2002).

III. STANDARD OF REVIEW

Regardless of whether a petition for intervention is filed timely or late, the Department's regulations require such a petition to describe how the petitioner is "substantially and specifically affected" by a proceeding. 220 C.M.R. § 1.03(1)(b); see also G.L. c. 30A, § 10. In interpreting this standard, the Department has broad discretion in determining whether to allow participation, and the extent of participation, in Department proceedings. See Attorney General v. Dept. of Pub. Utils., 390 Mass 208, 216 (1983); Boston Edison Co. v. Dept. of Pub. Utils., 375 Mass. 1, 45 (1978) (with regard to intervenors, the Department has broad, but not unlimited discretion), cert. denied, 439 U.S. 921 (1978) ("Boston Edison"); see also Robinson v. Dept. of Pub. Utils., 835 F.2d 19 (1st Cir. 1987). The Department may allow persons not substantially and specifically affected to participate in proceedings for limited purposes. G.L. c. 30A, § 10; 220 C.M.R. § 1.03(1)(e); Boston Edison, 375 Mass. at 45. A petitioner must demonstrate a sufficient interest in a proceeding before the Department will exercise its discretion and grant limited participation and it is not required to allow all petitioners seeking intervenor status to participate in proceedings. Id.

Should the hearing officer agree that the petitioner meets the threshold mentioned above, then when ruling on late-filed petitions to intervene, the hearing officer must balance the extent of participation against the need to conduct a proceeding in a complete, efficient, and orderly fashion. See Transition Costs, D.P.U. 94-104-B, at 5 (January 8, 1995) (Order on Hearing Officer Ruling Denying Late Petition to Intervene by MASSPOWER and Altresco Pittsfield, L.P.); see also New England Telephone and Telegraph Co., D.P.U. 94-50, at 3, Order on Appeal by Mark Brown of Hearing Officer Ruling Denying Late-Filed Petition to Intervene (July 22, 1994) ("NYNEX").

In ruling on late-filed petitions to intervene, or otherwise participate in its proceedings, the Department takes into account a number of requirements and factors in its analysis. First, the Department considers whether a petitioner has demonstrated good cause for filing late. See 220 C.M.R. § 1.01(4). While "good cause" may not be readily susceptible of precise definition, the proponent of a waiver must make a convincing showing of good cause and may not reserve such a showing for a later appeal of the hearing officer's ruling. See Bay State Gas Co., D.P.U. 95-52, at 2, Interlocutory Order (July 21, 1995). Administrative efficiency requires that a proponent of a waiver state all available grounds at the time the ruling is requested. If the Department finds that there is good cause and that the petitioner is substantially and specifically affected, then the Department balances the extent of participation against the need to conduct a proceeding in a complete, efficient, and orderly fashion.²

² When performing the balancing analysis, the Department has considered: (1) the extent of the delay; (2) the effect of the late participation on the ongoing proceeding; and (3) the explanation for the tardiness. See Western Massachusetts Electric Co., D.P.U. 92-

IV. ANALYSIS AND FINDINGS

When reviewing any petition to intervene, late or timely filed, the hearing officer must first determine whether the petitioner is substantially and specifically affected by the proceeding. I determine that ASCENT has not shown in its petition how it meets this threshold test. The facts that Network Plus, the subject of our investigation and ably represented by its own counsel, is a member of ASCENT and that several other ASCENT members provide telecommunications services in New Hampshire is an insufficient basis upon which to base a finding that ASCENT is substantially and specifically affected by this proceeding.³

Even if ASCENT did meet this threshold test, ASCENT offers no good cause, and, in fact, offers no explanation at all, for filing its petition late. In addition, the procedural schedule in this proceeding was greatly accelerated, the evidentiary hearing has been held, the evidentiary record is closed (excepting certain responses to record requests), and initial post-hearing briefs have been filed. It is unclear from ASCENT's petition how ASCENT's intervention as a party at this late stage of the proceeding would be meaningful. However, in its petition, ASCENT indicated that the "sole and specific purpose" for its intervention was "to monitor the proceeding" (Petition at 2). ASCENT can achieve this purpose without formal intervention as a party through use of the Department's website, <http://www.state.ma.us/dpu>, and accessing the "Enhanced Fileroom" function. In addition, in order to facilitate ASCENT's monitoring of this proceeding, the Department will add ASCENT to the service list for this proceeding to receive copies of filings, pleadings, and submissions made during the remainder of the Department's investigation. All parties are instructed to include ASCENT in the distribution of materials. An updated service list is attached to this hearing officer ruling.

V. RULING

ASCENT's late filed petition to intervene in D.T.E. 02-15 is denied. However, in order to facilitate its monitoring of this proceeding, ASCENT will be added to the service list to receive copies of filings, pleadings, and submissions made during the remainder of this investigation.

8C-A at 5 (1993); see also NYNEX, D.P.U. 94-50, at 3 (1994).

³ Even if I assume for the purposes of ASCENT's argument that it intended to reference its Massachusetts members, rather than those in New Hampshire, I still find that this statement alone does not provide a sufficient basis for a finding that ASCENT is substantially and specifically affected by this proceeding.

Under the provisions of 220 C.M.R. § 1.06(6)(d)(3), any party may appeal this Ruling to the Commission by filing a written appeal with supporting documentation within five (5) days of this Ruling. Any appeal must include a copy of this Ruling.

Date: March 13, 2002

_____/s/_____
Paula Foley, Hearing Officer